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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.M., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

I.K.,

Defendant and Appellant.

E072307

(Super.Ct.No. J273563)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes,
Judge. Affirmed.

Sarah Vaona, under appointment by the Court of Appeal, for Defendant and
Appellant.

Michelle D. Blakemore, County Counsel, and Jamila Bayati, Deputy County
Counsel, for Plaintiff and Respondent.

I.K. (Mother) appeals from an order terminating her parental rights to her minor son, A.M., under Welfare and Institutions Code section 366.26.¹ She argues that she was not given notice of the section 366.26 hearing in compliance with the requirements of section 294. Although she does not deny that she had actual notice of the section 366.26 hearing, she contends that the statutory notice defect constitutes structural error and is therefore reversible per se. We agree that San Bernardino County Children and Family Services (CFS) did not fully comply with section 294 in providing notice to Mother, but we conclude that the error was not structural and was harmless under any standard. We therefore affirm.

BACKGROUND

A.M. was born in August 2016 when Mother was 14 years old. At that time, Mother was under the legal guardianship of her maternal grandparents. A.M. came to the attention of CFS one year later in August 2017 when Mother was hospitalized for being under the influence of Xanax and marijuana. Mother and her guardian were interviewed at the guardian's home. A.M. appeared healthy, well cared for, and bonded to Mother. On September 22, 2017, Mother's guardian reported to CFS that Mother had gone missing with A.M. Mother and A.M. had not been located by November 1, 2017, when Mother's maternal grandmother voluntarily terminated the guardianship and released

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother to CFS's custody. After a detention hearing held on November 6, 2017, Mother and A.M. were located and placed—Mother in a group home and A.M. in a foster home.

An initial jurisdiction and disposition hearing was held on November 27, 2017, and Mother attended. The matter was referred to mediation and the case was continued. Mother failed to attend the mediation. Mother ran away from placement on December 7.

In January 2018, a continued jurisdiction and disposition hearing was held, and Mother was not present. Mother's attorney reported that she was "AWOL from her current placement." Allegations under subdivisions (b) and (g) of section 300 were sustained against Mother. Reunification services were ordered for Mother.²

The six-month status review hearing was held in August 2018. Mother was provided written notice of the hearing but did not attend. At the hearing, Mother's attorney reported that Mother's whereabouts had become unknown again. The court adopted CFS's recommendation and terminated Mother's reunification services. During the review period, Mother had minimal contact with A.M. and did not participate in any reunification services. Mother went missing from two group home placements and was detained in juvenile hall twice. A selection and implementation hearing under section 366.26 was set for December 4, 2018.

On September 13, 2018, CFS filed a declaration of due diligence, documenting their unsuccessful efforts in locating Mother whose whereabouts remained unknown.

² The court also found that T.M. was the alleged father and sustained allegations against him. T.M. was denied reunification services.

The court granted CFS's request to notify Mother of the section 366.26 hearing via her attorney. Notice was sent to Mother's attorney later that month by certified mail.

Mother was hospitalized on November 15, 2018. A social worker visited Mother at the hospital the following day and explained to Mother that a hearing was being held on December 4, 2018, to terminate Mother's parental rights on CFS's recommendation. Mother was not provided any written notice. After Mother was released from the hospital, she was placed at a CFS-operated temporary youth shelter. The social worker who testified had one additional in-person visit with Mother. On November 21, a social worker transported Mother to a supervised visit with A.M. On November 24, Mother again ran away from CFS's custody.

Mother was not present at the section 366.26 hearing held on December 4, 2018. Her attorney appeared on her behalf and indicated that Mother's whereabouts were unknown. The hearing was continued to allow CFS additional time to provide notice under the federal Indian Child Welfare Act of 1978 (25 U.S.C. § 1901, et seq.). Notice of the continued hearing was provided to A.M.'s maternal grandmother (Mother's mother), the caregiver, and the alleged father.

The continued section 366.26 hearing was held on March 4, 2019, and Mother was again not present. Mother's attorney argued that Mother had not received proper notice of the initial section 366.26 hearing in December 2018. After the social worker testified about the contact that she had with Mother in November 2018, the court overruled the objection. The court reasoned that Mother had been properly noticed through her

attorney after CFS's due diligence search failed to locate Mother and that Mother's "temporary placement" with CFS in November 2018 did not require "the whole noticing process to have to start again." Turning to the merits, the court concluded that adoption was in the minor's best interest and terminated Mother's parental rights.

DISCUSSION

A. *Notice of Appeal*

Mother did not sign the notice of appeal. On that basis, CFS argues that we should dismiss Mother's appeal because Mother did not authorize it. We disagree.

An attorney may not appeal without the consent of the client. (*In re Steven H.* (2001) 86 Cal.App.4th 1023, 1029 (*Steven H.*)) The notice of appeal may be signed by either the appellant or the attorney. (Cal. Rules of Court, rule 8.100(a)(1).) "[A] notice of appeal shown to have been signed by an unauthorized attorney is ineffectual in preserving the right to appeal." (*In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043 (*Alma B.*); *Guardianship of Gilman* (1944) 23 Cal.2d 862, 864.) "In the absence of a satisfactory showing that the party did not authorize counsel to sign the notice of appeal, we presume that her counsel had the necessary authority to do so." (*In re Asia L.* (2003) 107 Cal.App.4th 498, 505 (*Asia L.*))

Here, Mother's attorney signed the notice of appeal, but Mother did not. Mother has not attended any hearings other than the initial jurisdiction and disposition hearing. Because of Mother's failure to attend the section 366.26 hearings and nearly all of the other hearings, CFS contends that we can infer that Mother did not authorize the appeal.

We decline to do so. Although Mother attended only the initial jurisdiction and disposition hearing, the record contains no evidence that Mother at any point indicated to her attorney that she did not want to try to preserve her parental rights as to A.M., including pursuit of her appellate remedies.

Despite the absence of evidence that the appeal was not authorized by Mother, CFS contends that Mother was required to file a declaration under Code of Civil Procedure section 909 either in this court or in the trial court affirmatively indicating her authorization of the appeal. Again, we disagree. Section 909 of the Code of Civil Procedure authorizes this court to receive additional evidence on appeal, but it does not require a party to submit evidence demonstrating that the appeal was authorized. Rather, a notice of appeal signed by the appellant's attorney gives rise to a presumption that the appellant authorized the appeal. (*Asia L.*, *supra*, 107 Cal.App.4th at p. 505.) Mother's attorney signed the notice of appeal, so we presume that the appeal was authorized. Mother was not required to make any additional showing demonstrating her desire to appeal. On the contrary, CFS had the burden of showing that Mother did not authorize her attorney to sign the notice of appeal. (*Ibid.*)

As we have already indicated, the record contains no evidence that Mother did not authorize her attorney to pursue her appellate remedies. CFS therefore has failed to carry its burden of demonstrating that Mother's attorney was not authorized to file this appeal. That conclusion comports with the strong public policy in favor of considering appeals

on their merits.³ (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 910; Cal. Rules of Court, rule 8.100(a)(2).)

For all of these reasons, we deny CFS's request to dismiss the appeal.⁴

B. Notice of Section 366.26 Hearing

Mother argues that she was not given notice of the section 366.26 hearing in compliance with the requirements of section 294. We agree.

Section 294 prescribes the manner in which CFS is to give notice of a section 366.26 hearing. (*Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1114.) For a parent whose identity is known but whose whereabouts are unknown, if CFS recommends adoption and the court finds that CFS has exercised due diligence in attempting to locate and to serve

³ Even if we were to infer lack of authorization because of Mother's general failure to appear at hearings, dismissal would not be appropriate here. As explained in *Steven H.*, "when an appeal is based upon the contention appellant did not receive proper notice of the trial court proceedings, and the record contains no evidence that appellant was actually made aware of what occurred within the time limit for filing the appeal, there is no requirement that appellant personally authorize the appeal." (*Steven H.*, *supra*, 86 Cal.App.4th at p. 1031.) As in *Steven H.*, the only issue raised on appeal here is whether proper notice of the section 366.26 hearing was provided. Improper notice was not the subject of the appeals in *Alma B.*, *supra*, 21 Cal.App.4th 1037 and *In re Sean S.* (1996) 46 Cal.App.4th 350—the cases relied on by CFS—so those cases are not persuasive.

⁴ We further reject CFS's argument that we should dismiss the appeal on the ground that Mother is disentitled to relief in this court because of her conduct in the proceeding below. Although Mother did not appear at the section 366.26 hearings and made minimal progress toward reunification, her conduct was not so egregious as to deprive her of the right to "ask the aid and assistance of [this] court." (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 2:340 ["Appellate courts have inherent power to dismiss or stay an appeal taken by a party who is in *contempt* of a trial court order issued in the action or who, although not adjudged in contempt, has *wilfully disobeyed* court orders in the action."].)

the parent, then CFS may give notice to the parent by serving written notice on the parent's attorney of record via certified mail, return receipt requested.⁵ (§ 294, subd. (f)(7)(A).) The notice must include "[t]he date, time, and place of the hearing" and CFS's recommendation. (§ 294, subd. (e)(1) & (5).) "In any case where the residence of the parent becomes known, notice shall immediately be served upon the parent" (§ 294, subd. (f)(7)(C)) in writing by the methods prescribed in subdivision (f)(2) through (5) of section 294 (again assuming the recommendation is termination of parental rights), which include personal service and certified mail.

CFS gave Mother notice of the initial section 366.26 hearing in September 2018 by serving written notice on Mother's attorney in accordance with section 294, after the court found that CFS had exercised due diligence in attempting to locate and serve Mother. Mother's whereabouts became known to CFS on November 15, however, when Mother was admitted to the hospital. A social worker visited Mother at the hospital the next day and orally informed Mother that a section 366.26 hearing was scheduled for December 4, 2018, and that CFS was recommending termination of Mother's parental rights. CFS then placed Mother, who herself was a juvenile dependent, in a CFS temporary youth shelter. Mother remained at the shelter until she ran away on November 24.

⁵ CFS must petition the court to serve the parent through the parent's attorney at least 75 days before the section 366.26 hearing. (§ 294, subd. (f)(7).)

Mother contends that when her whereabouts at the hospital became known to CFS, the notice requirements of section 294, subdivision (f)(7)(C), were triggered and CFS was required to serve her immediately by personal service, certified mail, or one of the other methods specified in subdivision (f)(2) through (5) of section 294. CFS responds that, by its terms, subdivision (f)(7)(C) of section 294 applies only when the “residence” of the parent becomes known, and neither the hospital nor the temporary shelter was Mother’s residence.

We agree with CFS that the hospital was not Mother’s residence, so subdivision (f)(7)(C) of section 294 was not triggered when the social worker visited Mother at the hospital on November 16. But when Mother was discharged from the hospital, CFS placed her in a CFS-operated temporary shelter. At that point, Mother was a dependent minor whose care, custody, and control were under CFS supervision, and CFS had placed Mother (albeit temporarily) at a CFS facility. We see no alternative to the conclusion that the facility was Mother’s residence. Mother had no other residence, and she was not homeless. She resided at the temporary shelter, though only for a few days until she again ran away. Because Mother’s residence was then known to CFS, subdivision (f)(7)(C) of section 294 required CFS to serve Mother with notice immediately by one of the means specified in subdivision (f)(2) through (5) of section 294. CFS did not do that.⁶

⁶ CFS argues that after Mother was discharged from the hospital, “preparing the written notic[e] would have been secondary to finding [Mother] a permanent placement.” We are not persuaded that the need to identify a placement for Mother excused CFS from

For all of the foregoing reasons, we agree with Mother that she was not given notice of the section 366.26 hearing that fully complied with the requirements of section 294.

C. Due Process, Structural Error, and Prejudice

Mother contends that the statutory notice violation deprived her of due process, constituted structural error, and therefore is reversible per se. In the alternative, she argues that the notice defect was prejudicial, so reversal is still required. We reject all of these arguments. The notice defect was not a due process violation or structural error, and it was harmless beyond a reasonable doubt.

The cases Mother cites in support of her due process argument are readily distinguishable. In *In re Anna M.* (1997) 54 Cal.App.4th 463, the court told the mother that the permanent plan would likely be guardianship and did not mention termination of parental rights as a possibility, and when the social services agency's recommendation changed to termination of parental rights, the mother was not given any notice of that change in any manner. (*Id.* at pp. 466-467.) And in *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, the social services agency made no attempt to locate the mother after

complying with its statutory notice obligations under subdivision (f)(7)(C) of section 294. When a long-absent parent who has a section 366.26 hearing pending unexpectedly appears at a review hearing, ordinarily the courtroom officer personally serves the parent with written notice of the section 366.26 hearing on the spot. When a chronic runaway dependent minor mother who has a section 366.26 hearing pending unexpectedly lands in CFS custody, there is no reason why she should not be treated similarly.

her reunification services were terminated at the six-month review hearing. (*Id.* at p. 1116.)

Neither of those cases supports Mother's contention that her due process rights were violated.⁷ CFS exercised due diligence in trying to locate Mother but failed. With court authorization, CFS then properly noticed Mother by serving written notice on Mother's counsel, reflecting CFS's recommendation that Mother's parental rights be terminated. And when the social worker visited Mother in the hospital in November 2018, the worker orally informed Mother of the date of the section 366.26 hearing and of CFS's recommendation that Mother's parental rights be terminated at that hearing. Thus, Mother had actual notice of both the date of the hearing and what was at stake.

Mother notes that when the social worker visited her at the hospital and provided oral notice of the section 366.26 hearing, the worker also gave Mother information about services. Mother suggests that by providing information about services, the worker may have confused Mother about whether she still had a chance to reunify and thus confused her about what was at stake at the section 366.26 hearing. We find this argument unpersuasive, and we also do not believe that written notice would have solved this putative problem. At all relevant times, Mother herself was a dependent minor suffering from various pathologies and in urgent need of services, and CFS had an obligation to try

⁷ Mother also cites *Steven H.*, but in that case the court did not find a due process violation. Rather, the court determined there was a statutory notice violation that was prejudicial. (*Steven H.*, *supra*, 86 Cal.App.4th at pp. 1031-1033.)

to link her with appropriate services. So the worker rightly gave Mother information about services while also informing Mother of CFS's recommendation that Mother's parental rights to A.M. be terminated at the section 366.26 hearing set for December 4, 2018. Any confusion that might have been caused by providing information about services and simultaneously providing notice of the section 366.26 hearing was unavoidable and would not have been remedied by providing the notice in writing rather than orally.

We are not aware of any authority for the proposition that under all of these circumstances, the mere statutory notice defect at issue here constitutes a due process violation. We conclude that it does not. And because Mother's argument that the defect constituted structural error is based entirely on her due process claim (and on the same distinguishable cases), the structural error argument fails as well.⁸

Accordingly, the notice defect constitutes reversible error only if it was prejudicial. We conclude that the error was harmless beyond a reasonable doubt.⁹

⁸ We also note that in *In re James F.* (2008) 42 Cal.4th 901, the Supreme Court expressed skepticism about "whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported wholesale, or unthinkingly, into the quite different context of dependency cases." (*Id.* at pp. 915-916.)

⁹ In *In re James F.*, the Supreme Court declined to decide whether the proper standard for prejudice analysis in a dependency case is harmless beyond a reasonable doubt or harmless by clear and convincing evidence. (*In re James F.*, *supra*, 42 Cal.4th at p. 911, fn. 1.) We assume without deciding that the harmless beyond a reasonable doubt standard applies because it "provides a more cautious approach." (*In re Esmeralda S.* (2008) 165 Cal.App.4th 84, 94.)

Mother argues that CFS's failure to provide her with notice satisfying the requirements of section 294 was prejudicial because, had she been provided with written notice, she "could have more readily recalled the date, time, place, and purpose of the hearing, and therefore could have appeared at the initial section 366.26 hearing and conferred with counsel." Assuming for the sake of argument that all of that is true, it does not follow that Mother would have been more likely, or likely at all, to attend the initial section 366.26 hearing. The social worker testified that when she saw Mother in the hospital less than one month before the initial section 366.26 hearing, she told Mother the date of the initial section 366.26 hearing and explained to Mother that CFS was recommending that Mother's parental rights be terminated. The record contains no evidence that Mother did not understand what had been explained to her about the upcoming section 366.26 hearing. Moreover, although Mother has been aware of this dependency proceeding since its inception, she attended no hearings other than the initial jurisdiction and disposition hearing. In sum, the record provides no basis to conclude that Mother would have been more likely to attend the section 366.26 hearing if she had been provided with written notice in compliance with section 294. The notice defect was therefore harmless beyond a reasonable doubt.

Moreover, even if Mother had attended the section 366.26 hearing, the record confirms beyond a reasonable doubt that she would not have obtained a more favorable result. Mother had minimal contact with A.M. since his detention, did not complete any aspect of her case plan, repeatedly went missing from CFS custody, and failed to appear

at all but one of the hearings in this case. She does not explain how the result of the section 366.26 hearing would have been more favorable to her if CFS had fully complied with section 294 or if she had been present at the hearing. She does not argue, for example, that A.M. would have been found not adoptable or that a statutory exception to adoption would have applied. No such argument could succeed, because the record contains no support for either proposition. (*In re Z.S.* (2015) 235 Cal.App.4th 754, 772; *In re J.H.* (2007) 158 Cal.App.4th 174, 185.)

Mother had actual notice of the section 366.26 hearing and the recommendation to terminate her parental rights, but she failed to attend the hearing. She attended only one hearing in this entire case, had minimal contact with A.M. since detention, and made no progress in her case plan. For all of these reasons, we conclude that CFS's error in failing to provide Mother with written notice of the initial section 366.26 hearing was harmless beyond a reasonable doubt.

DISPOSITION

We affirm the March 4, 2019, order terminating Mother's parental rights.

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MENETREZ
J.

We concur:

McKINSTER
Acting, P. J.

CODRINGTON
J.